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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, *Petitioners*

v.

RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, ET AL., *Respondents*

RED LION BROADCASTING CO., INC., ET AL., *Petitioners*,

v.

FEDERAL COMMUNICATIONS COMMISSION, *Respondent.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE DISTRICT OF COLUMBIA AND SEVENTH CIRCUITS

Brief of: Office of Communication of the United Church of Christ,
United Church Board for Homeland Ministries,
Board of National Missions of the United Presbyterian Church in the U.S.A.,
National Division of the Methodist Board of Missions,
General Board of Christian Social Concerns of the Methodist Church,
The National Council of Churches—Broadcasting and Film Commission,
National Catholic Conference for Interracial Justice,
National Board of the Young Women's Christian Association of the U.S.A.,
The American Jewish Committee,
National Citizens Committee for Broadcasting, and
American Federation of Labor-Congress of Industrial Organizations, *Amici Curiae*

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249 Press of Fremont Payne, Inc., 80 Washington St., N. Y.—BOwling Green 9-8153

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National Board of the Young Women's Christian Association of the U.S.A.
The American Jewish Committee,
National Citizens Committee for Broadcasting, and
American Federation of Labor-Congress of Industrial Organizations, *Amici Curiae*

Preliminary

This brief as *amici curiae* is submitted, with the consent of the parties, by the organizations listed on the cover. They may be described as:

(a) National instrumentalities of Protestant and Greek Orthodox churches concerned with broadcasting and with service to racial minorities and the underprivileged;

(b) National organizations of persons of the Christian and Jewish faiths concerned with social service and the protection of racial and religious minorities;

(c) A non-profit educational corporation concerned with better broadcasting; and

(d) A non-profit organization concerned with protection of the rights and interests of labor.

These organizations have experience in broadcasting and with its effects both as producers of programming on religious and social issues and as participants in social action in all parts of the United States.

Background

The concept of fairness is as old as our system of broadcasting.[1] From the earliest days of radio, broadcast licenses were reserved for those who proposed to serve the broad range of community interests and were denied to those who used their facilities for purely personal expres-

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[1] For an historical review of broadcast fairness, see U. S. Senate Committee on Commerce, Subcommittee on Communications, *Fairness Doctrine* (Staff Report prepared by Robert Lowe), 90th Cong., 2nd Sess., 1968. See also Leon Seymour Stein, "Editorializing by Broadcast Licensees" (Unpublished Ph.D. Dissertation, New York University, 1965).

sion. As early as 1929, in its *Great Lakes* brief,[2] the Federal Radio Commission stated:

> "Broadcasting stations are licensed to serve the public and not for the purpose of furthering the private or selfish interest of individuals or groups of individuals. The standard of public interest, convenience, or necessity means nothing if it does not mean this. Insofar as a program consists of discussion of public questions, public interest requires ample play for the free and fair competition of opposing views, and the Commission believes that the principle applies . . . to all discussions of issues of importance to the public."

As early as 1931, the Commission indicated that use of a public channel to make unfounded personal attacks was not consistent with good broadcast service:

> "The Commission holds no brief for any parties subjected to attacks through the medium of Station KGEF, but in almost every instance appearing in the record the attacks made by Shuler, and the methods employed therefore, are certainly not in the interests of the public or the rendition of a commendable broadcasting service. The broadcasts of this party are filled with misstatements of fact and insinuations based thereon. . . . Surely, the use, in such a manner, of one of the most powerful mediums of furnishing instruction and entertainment to the public does not meet the statutory standard upon which the right to hold a license must be based. While the Commission does not have the power of censorship, it does have the duty of determining whether the standard fixed by law has been or will be met by the use of a broadcast license. Broadcasting facilities are limited. . . . For each license held and used in a manner such as that of the applicant, there is a potential licensee who is able,

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[2] *Great Lakes Broadcasting Co.* v. *Federal Radio Commission*, 37 F. 2d 993 (D. C. Cir. 1930), reversed the Commission but indicated approval of its findings as to programming.

ready and willing to conduct his station in such a manner as to furnish a good broadcasting service.'"[3]

The rule of "fairness" was refined and clarified in a number of cases over the next two decades. Consistent with the concept that the channels were to provide expression for the public and not for the station owners, it was held that "the broadcaster cannot be an advocate", which was taken to mean that he should not editorialize.[4]

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[3] FRC, Docket 1043, *Trinity Methodist Church, South,* KGEF (1931); affirmed, *Trinity Methodist Church, South* v. *Federal Radio Commission,* 62 F. 2d 850 (D. C. Cir., 1932).

[4] See *Mayflower Broadcasting Corporation,* 8 F.C.C. 333 (1941). The full rationale was:

> "Under the American system of broadcasting it is clear that responsibility for the conduct of a broadcast station must rest initially with the broadcaster. It is equally clear that with the limitations in frequencies inherent in the nature of radio, the public interest can never be served by a dedication of any broadcast facility to the support of his own partisan ends. Radio can serve as an instrument of democracy only when devoted to the communication of information and the exchange of ideas fairly and objectively presented. A truly free radio cannot be used to advocate the causes of the licensee. It cannot be used to support the candidacies of his friends. It cannot be devoted to the support of principles he happens to regard most favorably. In brief, the broadcaster cannot be an advocate.
>
> "Freedom of speech on the radio must be broad enough to provide full and equal opportunity for the presentation to the public of all sides of public issues. Indeed, as one licensed to operate in a public domain the licensee has assumed the obligation of presenting all sides of important public questions, fairly, objectively and without bias. The public interest—not the private—is paramount. These requirements are inherent in the conception of public interest set up by the Communications Act as the criterion of regulation. And while the day to day decisions applying these requirements are the licensee's responsibility, the ultimate duty to review generally the course of conduct of the station over a period of time and to take appropriate action thereon is vested in the Commission." (pp. 339-40)

The "muzzling" of the station owners was strongly protested and was reconsidered at length in the *Mayflower* hearings.[5] Finally, in 1949, the rule was revised and set forth in a comprehensive statement of Commission policy, the "1949 Editorializing Report."[6] This statement reversed the previous policy against editorializing by broadcast licensees, but coupled the right to editorialize with the duty to present alternative views. Since 1949, this policy has been known as the "Fairness Doctrine".

Similarly, stations were permitted to make personal attacks, but they were cautioned that:

> ". . . elementary considerations of fairness may dictate that time be allocated to a person or group which has been specifically attacked over the station, where otherwise no such obligation would exist".[7]

This duty to invite reply has become known as the "personal attack principle" of the Fairness Doctrine.

In reporting the Equal-Time Amendment to the Communications Act in 1959, the Senate Committee took great care to indicate its intent that the Fairness Doctrine should remain in effect:

> "In recommending this legislation, the committee does not diminish or affect in any way Federal Communications Commission policy or existing law which holds that a licensee's statutory obligation to serve the public interest is to include the broad encompassing duty of providing a fair cross section of public affairs and matters of public controversy." (S. Rept. 562, 86th Cong., 1st Sess., p. 13.)

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[5] Representatives of some of the organizations submitting this brief participated in the *Mayflower* hearings in support of the rule of fairness.

[6] *Report on Editorializing by Broadcast Licensees,* 13 F.C.C. 1246, 25 P & F Radio Reg. 1901 (1949).

[7] 13 F.C.C. 1246, at p. 1252.

To make this point even clearer, a proviso was written into Section 315 as follows:

> "Nothing in the foregoing sentence shall be construed as relieving broadcasters, * * * from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

The Conference Committee of the House and Senate described this as "a restatment of the basic policy of the 'standard of fairness' which is imposed on broadcasters under the Communication Act of 1934" (H. R. Rept. No. 1069, 86th Cong., 1st Sess., 1959).

The 1949 Editorializing Report has remained Commission policy without substantial change.[8] Until recently it has been accepted by the industry without much objection and with no legal challenges. However, the personal attack rule has been reiterated and made more specific because of continued violations by some stations.[9]

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[8] Chairman Henry testified in July, 1963 that the Editorializing Report "still represents the Commission's basic policy in this important area". *Hearings on Editorializing Practices* before a Subcommittee of the House Committee on Interstate and Foreign Commerce 88th Cong., 1st Sess., 1963, p. 84. The *Editorializing Report* was republished as an attachment to the *Fairness Primer* on July 1st, 1964, 29 Fed. Reg. 10415. Apparently the *Public Notice of July 26, 1963*, 28 Fed. Reg. 7962, and the *Fairness Primer* were a response to criticism in the 1963 Congressional hearings that the Commission had not done enough to publicize the Fairness Doctrine.

[9] The *Public Notice of July 26, 1963*, 28 Fed. Reg. 7962 included the statement that

> "Several recent incidents suggest the desirability of calling the attention of broadcast licensees to the necessity for observance of the fairness doctrine stated by the Commission in its opinion of June 1, 1949 in Docket No. 8516."

When it adopted the rule now being attacked, the Commission noted that despite the July 26, 1963 Public Notice and the 1964 Fairness Primer and the Commission's rulings on the question,

> "* * * the procedures specified have not always been followed, even when flagrant personal attacks have occurred in the context of a program dealing with a controversial issue. It is for this reason that we now codify the procedures which licensees are required to follow in personal attack situations."

Changes in the Broadcast Industry

Increase in Channels

There have been dramatic changes in the broadcasting industry since 1949, including a considerable increase in the number of television stations and AM and FM radio stations.[10]

It has been suggested that the increase in the number of stations has resulted in such a diversity of program sources that the Fairness Doctrine is no longer necessary. However, despite the increase in stations, almost 2,000 communities in the United States have only one radio station licensed to serve them and 289 communities have only one licensed television station;[11] of course, many communities have none.

One of the requirements of a broadcast license is that the licensee provide public service to the community to which it is licensed, which should include local news coverage, public service announcements and reasonable opportunity for discussion of controversial issues of public importance in the service area. *Network Programming In-*

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[10] The number of on-air commercial television stations has increased from 69 to 626; educational television stations from 0 to 127; commercial AM stations from 2,006 to 4,135; commercial FM stations from 737 to 1,706 and educational FM stations from 34 to 318. *33rd Annual Report,* Federal Communications Commission, Fiscal Year 1967. U. S. Government Printing Office 1968.

[11] An analyses of radio station listings reveals that there are 1,279 communities with a single AM station, 173 with a single FM station and 278 with AM and FM stations operating under the same call letters. (An undetermined number of single AM-FM combinations program separately and operate under different call signs but have interlocking ownership.) *Broadcasting Yearbook 1968* (Washington, D. C. Broadcast Publications, 1967). In general, independent FM stations are financially weak and cannot produce much original programming. Of 405 such stations, only 115 reported a profit for 1967. Out of 1,482 AM and AM/FM stations in one-station communities, 417 reported a loss for 1967. In two station communities, 176 out of 513 reported a loss. *Broadcasting,* Feb. 10, 1969, p. 50.

quiry, Report and Statement of Policy, July 29, 1960, F.C.C. 60-970. Although residents of a small community may receive signals from a number of AM stations, only the station licensed to such community is likely to cover local issues. The same is true of television and FM radio stations which are fewer in number and have smaller service areas.

Many of the AM stations broadcast only during daytime hours. Many of them are so-called "rip and read" operations which select their news reports from a wire service and present little or no public affairs programming (see footnote 22, below).

Similarly, there is little diversity in the coverage of local news and issues on television stations, particularly in small communities. The economics of the industry is such that profitable operation is difficult without a network affiliation.[12] The networks, however, have a policy of granting affiliation only to stations in large communities and of protecting them from competition with stations in or near their service areas.[13] Independent stations find it difficult to operate profitably even in major markets[14] and there are relatively few of them.[15] Furthermore, networks give a preference in granting affiliation to owners of AM affiliates and multiple owners[16] which tends to limit the competitive effect of new stations.

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[12] See *Network Broadcasting,* H. Rept. 1297, 85 Cong. 2d Sess., pp. 195-198.

[13] *Ibid.,* pp. 216-17, 226-236.

[14] *Ibid.,* p. 197, Table 14.

[15] It was hoped that UHF stations could serve many areas outside major markets. However, the networks have refused to grant affiliations to UHF stations or have allowed them only programs which are unacceptable to VHF affiliates (*Ibid.,* pp. 220-226). This refusal of affiliation occurs even where viewers are in the grade B contour area of the VHF station or receive it by cable systems available only on a limited basis and at considerable cost.

[16] *Ibid.,* pp. 236-246.

Network Dominance of Programming

The increase in the number of television stations has been accompanied by a trend toward increased network control over the production of programming. This trend was disclosed by the Federal Communications Commission's Program Inquiry (Docket No. 12782) begun in February, 1959. The Commission found evidence that:

> ". . . network corporations, with the acquiescence of their affiliates, have adopted and pursued practices in television procurement and production through which they have progressively achieved virtual domination of television program markets. The result is that the three national network corporations not only in large measure determine what the American people may see and hear during the hours when most Americans view television, but also would appear to have unnecessarily and unduly foreclosed access to other sources of programming."[17]

The Report revealed that the percentage of independently-provided programs in network prime-time schedules declined from 32.8% in 1957 to 6.9% in 1964.[18] Moreover, in accordance with established policies, networks produce and own virtually all news and public affairs programs included in network schedules.[19]

There has also been a substantial increase in network participation in the syndication of programs, which increasingly consist of "off-network" programs. According to the Commission, "The first run syndication market appears to have virtually disappeared."[20]

The Commission has been considering since 1965 adoption of a rule to restrict network control of programming, in-

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[17] *Television Network Programming*, F.C.C. 65-227, 4 P & F Radio Reg. 2d, pp. 1589, 1591. See also *House Report No. 281*, 88th Cong. 1st Sess., May 8, 1963.

[18] *Ibid.*, p. 1600.

[19] *Ibid.*, p. 1599.

[20] *Ibid.*, p. 1606.

cluding a provision that 50% of the prime time schedule must consist of independent programs.[21] However, it appears clear that networks will continue to own and produce substantially all network-originated news and public affairs programs to maintain the policy of attempting to insulate such programs from the influence of sponsors and their advertising agencies. There is little local public-affairs programming on network affiliates and almost none in prime-time hours when the largest audience is available.[22]

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[21] *Ibid.*, See also P & F Radio Reg. Current Service, p. 53:601, 608n.

[22] A recent analysis of renewal applications of Oklahoma broadcast licensees by F.C.C. Commissioners Cox and Johnson concluded:

> "Of the 10 commercial television stations which submitted renewal applications in the instant proceeding (which take in a total of more than $16 million in gross revenues annually), only one station devotes as much as 2 hours a week to programs which can be classified as 'local public affairs' (out of 105 to 134 hours per week of programming). Two stations devote between 1 and 2 hours to local public affairs. Six stations carry less than 1 hour. Two stations carry none at all.
>
> "Three of the TV stations carry less than 8 hours of news per week.
>
> "There is not in the entire State a single regularly scheduled prime time program devoted to presentation, analysis, or discussion of controversial issues of public importance in the State or in the community.
>
> "There is not in the State a single station which carries as much as 1 hour per week of locally originated programming in the prime viewing hours, other than news, weather, and sports.
>
> "Radio, although a fairly significant source of news, and not infrequently of local news, provides almost literally no public affairs service at all other than news. With but a handful of exceptions, Oklahoma radio stations do not offer even a token effort to serve as a forum for discussion of local issues of public importance. *Broadcasting in America and the F.C.C.'s License Renewal Process: An Oklahoma Case Study*, 14 F.C.C. 2d 1, 12-13.
>
> * * *
>
> "In 1962 and 1963, the Federal Communications Commission held hearings on local television programming in Chicago and Omaha. It was found that even in the large cities, TV stations originated relatively little programming of their own, and that what local programming they did put on consisted mostly of news, weather, and sports'." (14 F.C.C. 2d at p. 8)

Documentaries and discussion programs on controversial issues are increasingly selected by a handful of television network executives, and rarely relate to local issues.[23] Thus the increasing reliance of the public on television programs for news and opinion and the decline in the number of metropolitan daily newspapers have not produced diversity but have resulted in a centralization of control over communication on public questions which is entirely without precedent in American history.[24]

Compliance With the Fairness Doctrine

With rare exceptions, the broadcast networks have complied with the Fairness Doctrine. Partly, this is because the networks provide programming for the widest possible national audience, including a broad spectrum of economic, racial, political and geographic interests. They therefore tend to avoid programming which is controversial enough to irritate any substantial group. Network documentaries

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[23] According to the former head of CBS News, he had to fight a continual battle with President Frank Stanton over coverage of the Vietnam war because of Stanton's "concern that too much 'dove-hawk' talk unsteadied the hand of the Commander in Chief". *Due to Circumstances Beyond Our Control,* Friendly, Fred W., Random House, New York, 1967 page 267. This dispute culminated in Friendly's resignation after the presentation of a fifth rerun of "I Love Lucy" instead of Senate Committee hearings on Vietnam (*ibid.*, p. 239). According to Friendly, decisions on equal time demands are not made by CBS network news directors, but by senior network executives and reflect political considerations. *Ibid.*, pp. 82-83, 91-92.

[24] According to *Broadcasting,* Dec. 16, 1968, p. 30, the *Report of the President's Task Force on Communications Policy* emphasizes that Federal regulatory policy has failed to diversify television output.

on controversial issues reached a peak in 1963, following the quiz scandals, but have declined since.[25]

Fairness Doctrine complaints against networks are extremely rare. An analysis of complaints filed with the F.C.C. during the period from July 1, 1965 to June 30, 1966 indicated that almost all the complaints were against local programming.[26]

Out of 14 program types against which complaints were made, the three network program types ranked 12th, 13th and 14th:

	% of Total Complaints
Network documentary	1.125%
Network news	0.875%
Network panel or discussion	0.875%

The most complained against program types were:

Syndicated program series	21.25%
Open mike	19.25%
Editorials	11.625%
Local News	10.25%

Out of 800 complaints, only 173 involved personal attacks and none of these was a complaint against a network.[27]

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[25] William S. Paley, CBS Board Chairman, is quoted as telling Edward R. Murrow, when Murrow's "See It Now" was discontinued, "I don't want this constant stomach ache every time you do a controversial subject". Friendly, *op. cit.*, p. 92.

Newton Minow said the networks "want provocative programs that don't provoke anybody" and the advertising agencies "want a strong, hard-hitting, non-controversial show that won't offend anybody—and above all no gloom." Minow, Newton, *"Equal Time"* Atheneum, 1964, p. 92. See also the chapter "Documentaries and Special Events" in McNeill, Robert, *The People Machine*, Harper & Row, New York, 1968, pp. 75-91.

[26] *Fairness Doctrine, supra*, pp. 64-74.

[27] *Ibid.*, p. 68, Table III. There were no political editorial complaints against networks because all networks have a policy against editorials of any kind.

To the best of our knowledge, all reported cases involving Fairness Doctrine complaints (including personal attacks) were against local stations, none of which was in a major market.[28] Except for the *Red Lion* case all have involved complaints of racist programming and personal attacks.

The "Fourth Network"[29]

It is no accident that Fairness Doctrine complaints are primarily against stations in small communities. Such stations are often marginally profitable and sell time at low rates. Large amounts of local radio and television time are purchased by distributors of syndicated programs. Programs are recorded on tape and "bicycled" from one

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[28] *Office of Communication* v. *F.C.C.*, 359 F. 2d 994 (D. C. Cir. 1966), reversing, *In re Lamar Life Broadcasting Co.*, 1 F.C.C. 2d 1484, 5 P & F Radio Reg. 2d 205, on rehearing 14 F.C.C. 2d 431, 13 P & F Radio Reg. 2d 769 (1968). *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 381 F. 2d 908 (D. C. Cir. 1967), *Anti-Defamation League* v. *F.C.C.*, 14 P & F Radio Reg. 2d 2051, affirming *Station KTYM*, 7 P & F Radio Reg. 2d 595 (1968); *In re Brandywine-Main Line Radio Inc.* (WXUR), 14 P & F Radio Reg. 2d 1051 (1968). Two other important cases have considered the constitutionality of the Fairness Doctrine more abstractly, i.e. the *Radio Television News Directors* case now before this Court and *Banzhaf* v. *Federal Communications Commission*, 14 RR 2d 2061 (1968). Of these, the *Banzhaf* case was initiated by a complaint against a television station (WCBS) in New York City and was based upon specific cigarette commercials. However, the Commission's ruling embraced all cigarette commercials. *The Radio Television News Directors* case does not involve any complaint against anyone.

[29] ". . . large parts of the U. S. are awash in a diet of far-right broadcasting. Urban listeners seldom hear the broadcasts or, if they do, quickly tune out. But in those areas known in the broadcast trade as 'the boondocks,' the sounds of the far right are, in effect, a fourth network." (*Newsweek*, July 4, 1966, p. 79)

station to another. Typically, the time is sold by the commercial department and the programming is neither previewed nor monitored.

The majority of these syndicated programs are sponsored by so-called "non-profit" organizations established by affluent persons. They are used for the broadcasting of the sponsor's political and social views. Typically, these programs contain a heavy diet of diatribe and abuse. The most frequent subjects for attack are Negroes, Jews, Catholics, indigents, foreigners, and holders of "left-wing" views. A common philosophy of such programming is that the groups under attack have infiltrated and subverted the traditional institutions of American life and are destroying America.

According to Jack Gould of the New York Times:

> "As any random sampler of radio stations can readily attest, the airwaves are literally burdened by thousands of programs, often bankrolled by individuals of substantial means and extremely conservative outlook, which have little to do with journalistic values. Radio stations, eager for additional revenue, accept the perorations of these spokesmen almost blindly. The news departments of such stations frequently are not even involved; the matter is regarded as a straight sale of time."[30]

In 1964, "The Hate Clubs of the Air [were] spewing out a minimum of 6,600 broadcasts a week, carried by more than 1,300 radio and television stations—nearly one out of every five in the nation." *Radio Right—Hate Clubs of the Air,* Fred J. Cook, *The Nation,* May 25, 1964, page 523.

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[30] New York Times, January 14, 1967.

By 1967, according to *TV Guide*, ". . . the strident voices of the so-called Radical Right . . . are now heard on more than 10,000 radio and television broadcasts each week in 50 states". *They Call Themselves Patriots,* Neil Hickey, *TV Guide,* April 15, 1967, page 14. A survey recently completed by the Office of Communication indicates that "call-in" radio programs are also widely used by right-wing sponsors and commentators, especially in the Mountain States, to promote extremist views and oppose liberal legislators. (See "Cleaning up the 'Call-in' ", Shayon, Robert Lewis, *Saturday Review,* Feb. 24, 1968, p. 56.

Examples of the programming of such stations appear in the initial decision on the renewal application of station WXUR. The intervenors in that case monitored and transcribed about 65 alleged personal attacks in one week and supplemented this list with many others. These attacks occurred on local programs and on a number of syndicated programs, including the "Twentieth Century Reformation Hour," "Life Line," "Manion Forum" "Behind the Headlines," "Commentary," "Independent American," "The Dan Smoot Report," "Church League of America," "Christian Crusade," and later, Richard Cotten's "Conservative Viewpoint".[31]

Although not all of the critical remarks could be classified as "personal attacks" within the meaning of the Commission rule, some examples may indicate their flavor:

> Senator Clark's "henchmen" were charged with threatening to put someone to sleep; the American Civil Liberties Union was described as "a Communist

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[31] "Christian Crusade" gave rise to the personal attack in the *Red Lion* case. "Conservative Viewpoint" included the personal attack in the *KTYM* case.

> front or transmission belt organization"; Dr. Franklin Littell was called "the left-wing President of the gestapo-like Institute for American Democracy" and he was referred to as "plainly and disgustingly sarcastic, rude, discourteous, insolent, arrogant, bigoted and intolerant". Dore Schary was described as having "a public record of affiliation with Communist fronts," the Methodist Board of Social Concerns was described as "active in the Methodist Federation for Social Action (a cited Communist front)."

There were no invitations to answer any of these comments.[32]

In a license renewal application involving television station WLBT in Jackson, Mississippi,[33] the Hearing Examiner refused even to hear evidence on the following matters, among others:

> A so-called "Freedom Book Store", carrying segregationist publications, was operated on the station premises. The station telecast several thousand free announcements for this book store during the renewal period, with no announcements for any group holding opposing views.

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[32] The Hearing Examiner held that "only for the most flagrant of violations should WXUR be denied its renewal of license". He found that on balance, WXUR "performed what would normally be considered a wholesome service in providing an outlet for contrasting viewpoints on a wide variety of subjects" and that the renewal application should be granted. *In Re Brandywine-Main Line Radio Inc.*, 14 P & F Radio Reg. 2d 1541.

[33] *Office of Communication* v. *F.C.C.*, 359 F. 2d 994 (D. C. Cir. 1966), on rehearing, *In re Lamar Life Broadcasting Co.*, 14 F.C.C. 2d 431, P & F Radio Reg. 2d 769 (1968).

Local public affairs programming consisted almost entirely of right-wing programs, including the Citizens' Council Forum, the Dan Smoot Report, Life Line, Freedom University of the Air, the Christian Anti-Communist Crusade, and the programs of Patriotic American Youth, the John Birch Society, and Women for Constitutional Government.

Paid spot announcements of the Citizens' Council were broadcast without reply, including the following statements, among others:

"You're seeing published proof that the Communists are directing the integration drive in Mississippi. . . ."

"The headlines tell the story . . . the Communists are leading the fight to integrate Mississippi".

"Recent news reports show how the Communists are trying to raise the race question in Mississippi!"

There was an alleged false news report that federal officers were coming to arrest the Governor. This was part of a Citizens Council stratagem to surround the Governor's Mansion with an armed mob so that he would not give in to a court order.

Evidence also showed that inflammatory editorials were broadcast calling upon television viewers to resist court orders directing the integration of the University of Mississippi. These editorials were followed by riots and loss of life.

Along with this unbalanced programming were violations of the personal attack principle. For example, a seven-program series called "Meet the Candidates" included a repeated question about the situation at Tougaloo College, which was then the only accredited college in Mississippi open to Negroes. Responses such as the following

were elicited:

> "One word describes it—horrible. We are nursing the viper to our breast. One man has said that there is not a Communist in the whole State of Mississippi and they are teeming up there at Tougaloo. They are working full force, day and night, and some of the most solid citizens sit back and say, 'Oh, no, we don't have any Communist', and then add insult to injury, anyone who disputes them is called a witch hunter and a wild eyed saboteur, and other such words."

It was not denied that when the President of Tougaloo College called the station manager to protest, and asked for a transcript, he was falsely informed that the station had no record of the program.

Syndicated programs presenting different views are available from such organizations as the United Nations, the National Council of Churches, the AFL-CIO and others. However, these organizations do not ordinarily purchase time from the stations and their programs have little circulation in the "Fourth Network".

Stations which carry the "hate clubs" attract audiences of like-minded listeners, who tend to take over the "open mike" shows and to control the choice of local announcers and commentators. Such stations become instruments of communication for only one segment of local opinion. If such stations were used only for attacks on national institutions, they would be relatively harmless but they take an active role in the discussion of local issues, such as school board elections, educational budgets, welfare policy, and selective service procedures. Since such stations are often the only stations licensed to their communities, they can create an atmosphere in local communities like the "McCarthy Era" in Washington.

The size and influence of the "Fourth Network" should not be underestimated. The leading program series, Rev-

erend MacIntire's "Twentieth Century Reformation Hour" is broadcast daily by about 635 stations,[34] and many similar program series are broadcast on hundreds of stations.

Summary of Views

The various broadcast parties argued below that the Fairness Doctrine, including the personal attack principle, inhibits free and vigorous debate. There was no substantial evidence submitted to the Commission in its rule-making proceedings that the Doctrine had this effect. The organizations submitting this brief believe that the most important part of the Fairness Doctrine is its emphasis on the affirmative duty of a licensee to cover controversial issues of public importance. Unless this duty is enforced by law, the great potential of broadcasting as an instrument for free expression of ideas will never be exploited. Left to their own preferences, the broadcast networks and most licensees would present a negligible amount of public affairs programming and such programming would be even more bland and innocuous than present programming. Since broadcasting has tended to supplant print media, the end effect of "freedom for broadcasters" would be less debate than we now have, and less than we knew before broadcasting began.

The Doctrine's requirement that all sides be presented is rarely invoked against networks, but in view of broadcasting's limited diversity of program sources, it is very necessary. Even if there were no Fairness Doctrine, the networks would have to follow a policy of fairness because the public and Congress would not tolerate one-sided programming from organizations having the unprecedented

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[34] *TV Guide*, April 15, 1967, p. 15. This circulation should be compared with the number of stations affiliated with each of the networks: NBC television—201, NBC radio—221, CBS television—192, CBS radio—244, ABC television—153, ABC radio (four sub-networks)—900, Mutual radio—500. Source: *Broadcasting Yearbook 1969*, pp. E6-E16.

concentration of power over public affairs programming which the three networks have today.[35]

The personal attack principle and the Personal Attack and Political Editorial Rule have virtually no application to network programming since networks never editorialize and almost never present personal attacks as that term is defined in the rule. However, the principle and Rule, if enforced, could serve as a means of access to local broadcast media for members of minority groups, and holders of minority views. Controversial ideas are heard in broadcasting today principally on small stations in rural areas where there is little or no diversity of media. For the most part, what they present is not robust debate but one-sided abuse, and unanswered it has little social utility. The organizations sponsoring this brief believe that the personal attack principle does not curtail discussion, but provides a means by which all points of view can get a hearing.

ARGUMENT

POINT I

The First Amendment to the Constitution not only permits but requires that the Commission act so as to assure fair use of the public airways.

Even prior to the Radio Act of 1927, it was recognized that the scarcity of radio channels required that they be used only for worthwhile programming and that among the important uses were instruction and discussion of

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[35] Very often the Fairness Doctrine is twisted and distorted by broadcasters to create an excuse for avoiding programs which might irritate powerful groups. McNeill, *op. cit.*, pp. 268-271. As McNeill, an experienced ex-broadcaster put it, "Viewed positively, the Doctrine can be regarded as a stimulus to a bolder editorial policy and a protection against outside pressures. Revoking it, as many broadcasters advocate, would be unlikely to result in more forthright expressions of editorial opinion". *Ibid.* p. 281. "Kicking the Fairness Doctrine will not strengthen TV news coverage. Fairness is about the only quality in broadcast journalism which makes it editorially superior to print". *Ibid.* p. 291.

social problems. In 1924, Secretary of Commerce Herbert Hoover stated that,

> "the value of this great system does not lie primarily in its efficiency. Its worth depends on the use that is made of it. It is not the ability to transmit, but the character of what is transmitted that really counts . . . For the first time in history we have available to us the ability to communicate simultaneously with millions of our fellowmen, to furnish entertainment, instruction, widening of vision of national problems and national events. An obligation rests upon us to see that it is devoted to real service and to develop material that is transmitted into that which is really worthwhile . . ."[36]

During this early period, radio stations were multiplying rapidly under licenses granted by the Secretary of Commerce. Between March and November of 1922, the number increased from 60 to 564 with the Secretary attempting to review program proposals and to assign frequencies in such manner as to protect the public interest. In April, 1926, it was held that the Secretary had no discretion to refuse radio station licenses under proper applications.[37] The result was a race for channels which continued until the enactment of the Radio Act of 1927. This Act created the Federal Radio Commission and made it clear that the Commission need not grant a license unless it is satisfied that "the public interest, convenience and necessity" would be served thereby. This phrase was universally understood to include the right to consider proposed program content and to review past programming. Thus, the 1929 Report of the Standing Committee on Radio Law of the American Bar Association argued in substance that "the

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[36] *Third National Radio Conference,* U. S. Department of Commerce Recommendations for Regulation (Washington: Government Printing Office, 1924), pp. 2-3.

[37] *U. S.* v. *Zenith Radio Corp. et al.*, 12 F. 2d 614 (N. D. Ill. 1926); Opinion of Acting Atty. Genl. Donovan, July 28, 1926, 35 *Op. Atty. Gen.* 126.

number of persons who may simultaneously engage in radio communication is rigidly limited by physical laws. Therefore, the licensing authority must have the power to determine the proportion of the radio spectrum assigned to any given type of service, to review its use by less worthy services, and to alter or replace the less worthy existing services with more worthy services."[38]

Among the first actions of the new Commission was its General Order No. 32, addressed to 164 stations, which stated that it was "not satisfied that public interest, convenience or necessity" would be served by granting their applications for renewal. And in its first review of the new "public interest" criterion for licensing, this Court stated that "the requirement is to be interpreted by its context, by the nature of radio transmission and reception, by the scope, character and quality of services . . ."[39]

Again in *National Broadcasting Co.* v. *United States* the Court stated:

> "Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation.[40]

Thus it has always been thought that the licenses to owners of broadcast stations could be conditioned on good

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[38] Paraphrased in Stein, *op. cit.*, p. 59.

[39] *Federal Radio Commission* v. *Nelson Bros. Bond and Mortgage Co.*, 289 U. S. 266, 285 (1933).

[40] 319 U. S. 190, 216 (1943). See also Note, "Governmental Regulation of the Program Content of Television Broadcasting," 19 G.W.L. Rev. 312, 317 (1950) and Note, "Regulation of Program Content by the FCC," 77 Harv. L. Rev. 701 (1964) and numerous cases cited therein.

The scarcity of channels has increased since the NBC decision,

(Footnote continued on following page)

service, and that in this sense, broadcasters were unlike publishers in print, who could be as good or bad as they liked. The extent to which a station has been made available for coverage of public issues has always been one measure of the quality of broadcast service.

In selecting among license applicants, the Commission considers not merely the program plans, but the character and financial responsibility of the applicants. These criteria, when taken with the criteria used by networks in granting affiliation and by advertisers in purchasing time, tend to limit licenses to persons of financial standing and established records of commercial success. If there were no element of scarcity, the licensing of important media for speech exclusively to such persons would surely violate the First Amendment. And given the practical necessity of this system, surely the free speech rights of those deprived of licenses must be protected to the maximum extent practicable.

The licensing of instrumentalities of speech and public assembly has many times been held to be irreconcilable with the First Amendment. See, for example, *Lovell* v. *Griffin,* 303 U. S. 444 (1937); *Jones* v. *Opelika,* 316 U. S. 584, 600 (1942), dissents adopted by the Court in 319 U. S. 103.

(*footnote continued from previous page*)

and this led former Commission Chairman Newton Minow, to write as recently as 1964:

> "A television channel is America's most scarce natural resource. As many as a dozen applicants plead for the privilege of using one channel. And because television channels are so scarce, because they can be used by such a small percentage of those who would like to have channels entrusted to them, their allocation and the supervision of their use rests with the federal government. Thus the government, not by choice but by absolute necessity, is ultimately responsible for the effect this medium has on the public." Minow, Newton, *Equal Time,* Atheneum, 1964, p. viii.

Where licensing is necessary, the licensee must make the facilities available to all views. *Kissinger* v. *New York City Transit Authority,* 274 F. Supp. 438 (SDNY 1967) (Anti-Vietnam War subway posters). Public facilities cannot be made available to some and not to all. *Brown* v. *State of Louisiana,* 383 U. S. 131, 143 (1966); *East Meadow Community Concerts Association* v. *The Board of Education,* 18 N. Y. 2d 129, 219 N. E. 2d 172 (1966), after remand, 19 N. Y. 2d 605, 224 N. E. 2d 888 (1967).

In effect, the government has delegated the power to control access to the public channels to a limited group of private censors.[41] In controlling use of the channels to preserve program quality and to prevent interference, the government must regulate these private censors to assure that they grant access to all views, even if sustaining time is necessary.

The idea that a financial burden may be imposed upon the exercise of First Amendment rights has been rejected by this Court. *Jones* v. *Opelika, supra;* Cf. *Follet* v. *McCormick,* 321 U. S. 573 (1944); *Murdock* v. *Pennsylvania,* 319 U. S. 105 (1943).

In *Follet* v. *McCormick,* the Court reiterated that:

> "the exaction of a tax as a condition to the exercise of the great liberty guaranteed by the First Amendment is as obnoxious * * * as the imposition of censorship or a previous restraint." (p. 577)

As the Court pointed out in that case (which involved the sale of religious literature) "freedom of religion is not merely reserved for those with a long purse."

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[41] In addressing the National Association of Broadcasters, Commissioner Robert E. Lee recently stated a "station proceeds at its peril if it does not know what is coming down the line. The job of the station is to censor and if it is doing its job, it censors every day." *Broadcasting,* Oct. 28, 1968, p. 63.

In the case of *Marsh* v. *Alabama,* 326 U. S. 501 (1946), this Court made it clear that private ownership or control over property usually available for speech would not be permitted to impair free speech rights. At issue there was the right of the public to distribute literature on the streets of a company town. It is significant that there the private owner held far more than a temporary license in the facilities, it owned them outright, but it did not escape the duty of permitting their general use for speech.

The question here, therefore, is not whether the Commission might inhibit the station owners' "freedom of speech". It is whether the government may grant a station owner the right to censor speech over a public channel and deny an ordinary citizen access to the channel even when he has been attacked. To put this another way, are the free speech rights of the station owner so precious that ordinary citizens must be silenced completely for fear of inhibiting him?

The *Red Lion* decision rests on the conclusion that both station owners and citizens have free speech rights and both should be implemented

> "after having independently selected the controversial issue and having selected the spokesman for the presentation of the issue in accord with their unrestricted programming, the Doctrine, rather than limiting the petitioner's right of free speech, recognizes and enforces the free speech right of the victim of any personal attack made during the broadcast."[42]

The language of Judge Learned Hand in upholding the Chain Broadcasting Rules is apt:

> "The Commission does therefore coerce their [the licensees] choice and their freedom; and perhaps, if the public interest in whose name this was done were other than the interest in free speech itself, we should have a problem under the First Amendment; we might

[42] 381 F. 2d 908, 923 (D. C. Cir. 1967).

> have to say whether the interest protected, however vital, could stand against the constitutional right. But that is not the case. *The interests which the regulations seek to protect are the very interests which the First Amendment itself protects . . .*" *National Broadcasting Co.* v. *United States*, 47 F. Supp. 940, 946 (SDNY, 1942) (emphasis ours).

Judge Hand went on to point out that the primary First Amendment rights were those of the public.

The time-tested rationale for the right of a minority to express abhorrent thoughts is that the best means of refuting obnoxious doctrine is competition with opposing ideas. *It is the availability of a reply which makes tolerable the protection of the original utterance.* This principle is illustrated by the recent *KTYM* decision. In that case, objections were filed to a renewal of license, alleging that the station had broadcast a series of anti-Semitic programs containing deliberate or recklessly false allegations against Jewish persons and organizations.

The Commission renewed the license without a hearing, expressly declining to put in issue the falsity of the material or whether the broadcasts were in the public interest, stating:

> "We do not hold that those broadcasts, or any similar broadcasts, were in the public interest, but rather, that it is in the public interest to have free speech on all subjects on licensed broadcast facilities provided only that all viewpoints are afforded a fair and equal opportunity for expression."[48]

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[48] *Complaint of Anti-Defamation League of B'nai B'rith against Station KTYM*, 7 P & F Radio Reg. 2d 595, 587 (1966), affirmed *sub nom, Anti-Defamation League* v. *F.C.C.*, 14 P & F Radio Reg. 2d 2051 (1968). In our view repeated programming of this kind with no serious effort to present alternative views is not in the public interest, even though opportunty to answer "personal attacks" is granted.

Since the Commission must find that KTYM's program service is in the public interest, the Commission can escape responsibility for its statements only if it ensures that the channel is available to all views.

If the television or radio service available in all or most service areas provided a reasonable cross-section of opinion on local and national issues, it might be argued that the public interest would be satisfied by presenting any public affairs programming, even if abusive and one-sided. But almost no public affairs programming is provided in sustaining time outside large cities. Paid time is monopolized by the views of a relatively small group of wealthy persons. Unless access is assured to all elements of the community, particularly racial minorities and the poor, broadcast freedom will remain freedom for the wealthy.

Equal access to the media has never been more important. See the recent *Progress Report of the National Commission on the Causes and Prevention of Violence* (*January 9, 1969*):

> "The media in this country have developed a tradition of being a forum for the presentation of divergent views, a market place of ideas. What are the criteria for access to the public through the media today? The question is important for the study of violence, because one of the minimum requirements for non-violent resolution of divisive social issues is that interested parties be given an opportunity to be heard. In a democratic society where ultimate power resides in the people, access to the mass media is essential for groups desiring peaceful social change. If important, discontented segments of our society are denied the right to be heard, subsequent resort to violence by these groups may perhaps be expected. Moreover, if a high value seems to be placed by the media on conflict and drama, perhaps to attract the large audiences necessary to economic well-being this may be a positive incentive

for groups to engage in violence. Violence itself may thus become a medium of communication, a means of access to the market place of ideas." (p. A-40)[44]

The Metropolitan Newspaper Analogy

The broadcasters have strenuously argued below and elsewhere that broadcast stations should be constitutionally indistinguishable from metropolitan newspapers.[45]

However, aside from the differences inherent in a licensing system, there are many imperfections in this analogy. Broadcast stations, particularly television stations, have

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[44] See also Barron, Jerome, "Access to the Press—A New First Amendment Right", 80 Harvard Law Review 1641 (1967).

[45] As stated by Mr. Minow in addressing the Conference on Freedom and Responsibility in Broadcasting, at Northwestern University School of Law on August 3, 1961:

> "After the issuance of the Blue Book, the NAB urged Congress to amend the Communications Act and give radio the same degree of freedom from governmental regulation of content as newspapers. In the hearings before the Senate Interstate and Foreign Commerce Committee on the matter (S. 1333, 80th Congress, 1st Sess.), Senator Wallace White, the Committee Chairman and one of the 'fathers' of the Communications Act, said that 'there is a vast difference in principle between the absolute right of anyone who wants to go into the newspaper business, and the necessarily limited right to operate a broadcasting station' (p. 120). He stated (p. 126): 'I do not accept in any degree that there is no difference between the power of Government with respect to newspapers and the power of Government with respect to radio communications . . . If you [radio people] are placing your feet on that foundation, [you] are just indulging in dreams. Because Congress will not stand, in the long run, for any such interpretation.' Other Senators were equally critical. Senator Edwin Johnson declared that the notion that 'radio presents a direct analogy to the press' is 'as fat-fetched as comparing an elephant to a flea.'" (Minow, *op. cit.*, pp. 88-89.)

become primarily vehicles for entertainment[46] rather than for news, information and discussion. As indicated above, the volume of controversial material in broadcasting is relatively small. Furthermore, the diversity of sources in the print media is vastly greater when account is taken of the multiplicity of trade papers, magazines, books, pamphlets, newsletters, hand bills, and the like.

It has been suggested that the broadcast media compete with the print media, and therefore, simply add to the diversity of sources. In fact, they have decimated the print media. Except for an audience of highly literate persons they are not really comparable. For vast elements of the population who do not seek to inform themselves about controversial public issues, the broadcast media are the only effective means of communication.

The multi-sensory effect of television breaks through to this group. The appearance of a familiar personality with an authoritative manner and illustrative pictures reaches a different and larger audience than printed symbols which require effort to understand and analyze.[47] Indeed, the vast superiority of television as a means of communicating advertising messages (including political advertising)[48] is the primary cause of the decline of metropolitan newspapers.

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[46] An example of the conflict between the entertainment and public information functions of broadcasting was the CBS decision to delay presentation of a speech by the President so as not to interfere with prime time programming. Friendly, *op. cit.*, pp. 251-2.

[47] Klapper, Joseph T., *The Effects of Mass Communication*, The Free Press, 1960, pp. 106-112. As the Court of Appeals said in *Banzhaf*, "It is difficult to calculate the subliminal impact of this pervasive propaganda, which may be heard, if not listened to, but it may be reasonably thought greater than the impact of the written word" (14 P & F Radio Reg. 2d at p. 2087).

[48] The expenditures for "TV and radio" in the 1964 Republican presidential campaign were ten times the expenditures for "Newspaper and magazine ads". About 85% of Governor Rockefeller's media expenditures in the 1966 gubernatorial election were for television and radio. McNeill, *op. cit.*, pp. 232, 234. There has been a steady increase in the use of non-rational political spot announcements. *Ibid.*, pp. 182-227.

Another fundamental difference is that a newspaper or magazine is a random access device from which one can select the sports, the comics or the editorials, while a broadcast program is a continuum from which one takes all or nothing. Broadcasters therefore tend to direct programming to the broadest possible audience and to give little service to minority tastes and needs. A metropolitan newspaper can set aside considerable space for minority interests (e.g., opera, ballet, bridge, chess, shipping, antiques, fashions, art, food, travel), without pressing such material on the majority, or losing mass circulation. Television's need to retain the mass audience governs all its programming including public affairs programs. Thus, in Jackson, Mississippi, a television station may avoid local programming of special interest to the substantial Negro minority for fear of antagonizing the audience at which its advertising is principally directed.[49] The networks permit Negroes to appear but only in a way which is acceptable or interesting to their principal audience.[50] Television stations rarely present programming which will bore or offend the majority. This policy limits diversity of view. The

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[49] It was alleged that the only local program in which Negroes participated on station WLBT (Jackson, Mississippi) was a gospel singing show at 6:45 AM Sunday morning. The station advised the Commission that it had a policy against programs which discussed integration or segregation. *Office of Communication* v. *F. C. C.*, 359 F. 2d 994 (D C Cir., 1966).

[50] Thus, George Scott, one of the actors in *East Side—West Side*, asserted in connection with alleged network censorship:

> "There was constant blue-penciling of material by the Program Practices Department of CBS. . . . In a segment called 'No Hiding Place,' a story about block-busting by unscrupulous real-estate operators, there was a scene in which I was to ask a colored woman—played by Ruby Dee, who is herself a marvelously bright woman—to dance. The scene was edited out of the script by CBS. I insisted that it be put back in. It was, and we shot it. *Then* it was cut out of the footage by the network." TV Guide, Jan. 18, 1964, pp. 18, 21.

dominance of networks over broadcast content is far greater than the effect of wire services on newspapers.[51]

A network news program commands an audience of six to sixteen million persons.[52] By comparison, a metropolitan daily newspaper, such as the New York Times, has a circulation of less than one million copies. The number of persons who read a particular news item is probably much smaller.

POINT II

License renewal proceedings have not proved effective in obtaining compliance with the Fairness Doctrine; the public interest requires a direct and summary procedure.

The Office of Communication of the United Church of Christ was, we believe, the first public complainant in the history of the Communications Act to obtain a hearing on the overall performance of a station licensee applying for a three-year renewal term. The Commission charged it with the burden of proof and restricted its right to examine the station's program logs, program transcripts and other

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[51] Although newspapers use wire services and syndicated programs, they select freely from a variety of sources and rely primarily upon their local staffs. One observer measured a small group of daily newspapers and concluded that "about 36% of their content was from outside sources, syndicates and wire services." Wiggins, James Russell, *Freedom or Secrecy*, New York, Oxford University Press, 1964, p. 222.

[52] McNeill, Robert, *The People Machine*, Harper & Row, New York, 1968, page 5. According to a CBS survey, about 59% of the adult population of the United States watched or heard about Senator Joseph R. McCarthy's answer to Edward R. Murrow and 33% believed McCarthy had proved Murrow was a pro-Communist or had raised doubts about him. *Friendly, op. cit.*, p. 60.

material. As predicted by the Court of Appeals,[53] the task assumed by the Office of Communication proved very burdensome. Before the proceedings were initiated, a monitoring study was made employing about thirty persons. Approximately three years were spent in various proceedings before a hearing was held. The hearing itself took approximately three weeks, and resulted in over 1700 pages of testimony and many thousands of pages of exhibits. The proposed findings comprise several hundred pages. The hearings on the WXUR license renewal took an even greater time and were even more burdensome on the public parties. In both cases, personal attack violations were found, and in both cases renewal was recommended based on the overall record of the station.[54] Both are under review.

Regardless of the ultimate results it is unreasonable to expect that the victim of a personal attack will be willing or able to conduct proceedings of this type except in the most extraordinary circumstances. Even community organizations will rarely be able to finance and conduct such

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[53] "The fears of regulatory agencies that their processes will be inundated by expansion of standing criteria are rarely borne out. Always a restraining factor is the expense of participation in the administrative process, an economic reality which will operate to limit the number of those who will seek participation; legal and related expenses of administrative proceedings are such that even those with large economic interests find the costs burdensome. Moreover, the listening public seeking intervention in a license renewal proceeding cannot attract lawyers to represent their cause by the prospect of lucrative contingent fees, as can be done, for example, in rate cases." *Office of Communication* v. *F.C.C.*, 359 F. 2d 994, at p. 1006.

[54] Renewal is dependent upon overall performance, not particular violations. *Letter to Cullman Broadcasting Company*, F.C.C. 63-849, September 18, 1963; *Letter to Honorable Oren Harris*, F.C.C. 63-851, September 20, 1963. Because of the drastic nature of renewal proceedings, they have not been either adequate or effective as a means of enforcing compliance with the F.C.C. regulations. Cf. *Head* v. *New Mexico Board of Examiners*, 374 U. S. 424, 434, n. 1 (1963).

proceedings. Thus, only where a licensee has committed persistent and outrageous violations is such action likely and even then no penalty may result because of superior performance in other types of programming.

Furthermore, a non-renewal of license many years following the violations has only a limited value in protecting the public interest. The purpose and value of free expression, after all, is as a guide to intelligent social action by an informed citizenry. Unless one's voice can be heard when action is still possible, the right to speak is a hollow one. The inflammatory editorials on Station WLBT and the barrage of Communist charges against civil rights advocates reached their height in the period before the Oxford riots on September 30, 1962. Disciplinary action which might take place hereafter cannot moderate the passions or prevent the death and bloodshed which then occurred.

In 1960 a Subcommittee of the Senate Committee on Commerce was appointed to make a complete study of federal policy on "uses of Government licensed media for the dissemination of political opinions, news, . . . and the presentation of political candidates". One of its recommendations was that:

> "The Federal Communications Commission should reform its internal procedures for the handling and processing of 'equal-time' and editorial 'fairness' complaints. The time lag at the Commission must be cut to the minimum. *Here are issues in which time is most certainly of the essence.*" (Emphasis added)[55]
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> "The physical handling of such complaints—in the mail room—at the first point received by the Commission must be so organized and staffed *so that the ac-*

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[55] Senate Report No. 994, pt. 6, 87th Cong., 1st Session, p. 10.

tion to ascertain all necessary facts on a given complaint begins within 24 hours of receipt of same by the Commission."[56]

Thus, it is clear that the Fairness Doctrine, as applied prior to the promulgation of the Personal Attack and Political Editorial Rules, did not protect the public; there was an imperative need for more effective procedures to compel licensees to perform their trusts.

POINT III

The Personal Attack and Political Editoral Rules are a modest first step toward balanced programming on controversial issues.

It is by no means accidental that the broadcasting industry has initiated its first legal challenges to the Fairness Doctrine eighteen years after its adoption. The fact is that for all these years the Doctrine has been little more than a pious expression of hope, complied with by some responsible licensees and disregarded by others. The Commission, with its customary caution and solicitude for the industry, has contented itself with an occasional reiteration of its views and a few warnings to violators.

According to *Newsweek* (July 4, 1966, p. 80):

> "There has so far been no rein whatsoever on the radio of the right. The FCC's 'fairness doctrine' declares that broadcasters must give equal time for reply to any subject or individual attacked, but it has no control over the virulence of the attack. Besides, the doctrine is seldom invoked. 'FCC enforcement in this area is terrible,' says one Senate staffer." See also: "Is the FCC Dead?", *The Atlantic,* July, 1967, page 29.

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[56] *Ibid.*, p. 11.

One thing is clear: self-regulation has been given every reasonable chance and has failed.

The new Rule will, for the first time, make it possible for one who is attacked and denied an opportunity to reply to obtain an immediate ruling at reasonable cost, and, where appropriate, a Commission order. This is only a modest advance. It will not provide a satisfactory procedure for correction of other Fairness Doctrine violations, such as programming on only one side of a public issue. However, the Commission can reasonably deal first with personal attacks and political editorials because these are often the matters where an immediate response is most necessary and where the appropriate person to make the response is easily identified.

Petitioners make the inconsistent arguments that the Rules are unnecessary to enforce compliance, and that the enforcement of the Rules would create such practical difficulties as to discourage all controversial issue programming.

The latter argument is by no means new. When the Fairness Doctrine was first announced in 1949, it was met with predictions that controversial programming would be perilous. To the extent that these new predictions may represent a threat to discontinue programming on controversial issues, the Commission has ample authority to deal with it. The same kind of predictions were made at the time of the last great "freedom of speech for broadcasters" controversy, i.e., when the Chain Broadcasting Regulations were adopted. The introduction to a pamphlet published by CBS at the time is attached as an exhibit to this brief.

Any licensee who has an honest desire to comply with the Fairness Doctrine, including the Personal Attack and Political Editorial Rules, should welcome an opportunity to be advised currently as to its obligations, instead of waiting until its license is in jeopardy before learning what it should do.

The alleged vagueness of the Rule presents no constitutional difficulty because a licensee has only to apply to the Commission for a ruling on a particular question and, in any event, will not be subjected to sanctions, absent a willful violation. See *Screws* v. *U. S.*, 325 U. S. 91, 102 (1945).

The Rules do not impose an undue financial burden.

It is usual, in granting a public franchise or privilege, to impose conditions protecting the public interest. There has been no showing that the financial cost of providing free time to respond will constitute an excessive burden. Despite the fact that the Fairness Doctrine has been in effect for eighteen years, station licenses have continued to increase in value.

In 1966 the highest prices in the history of broadcasting were paid for an FM station ($850,000 for WRFM, New York), and for a UHF television station ($3,900,000 for Channel 47, in Fresno, California.[57] Records were also set in 1967, when over $21,000,000 was paid for a television station in Houston, Texas.[58]

These prices reflect the stations' enormous profits in relation to investment in tangible broadcast property. In 1966, the television industry earned about $493 million on a depreciated cost of about $550 million.[59]

The broadcasting industry's income (before Federal income tax) has increased every year since 1959:

From 1959 to 1960 the increase was 9.6%; from 1960 to 1961 it was 8.1%; from 1961 to 1962 it was 33.3%; from 1962 to 1963 it was 12.1%; from 1963 to 1964 it was 22%;

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[57] F.C.C. 32nd Annual Report, pp. 95-96.

[58] F.C.C. 33rd Annual Report, p. 32.

[59] *Ibid.*, pp. 173, 176.

from 1964 to 1965 it was 8.1% and from 1965 to 1966 it was 12.3%.[60]

There is no basis for the suggestion that the burden of furnishing time to reply is comparable to the threat of a $500,000 libel judgment for a single attack. See, *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), or a $10,000,000 claim (see *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130, 137 (1967).

Indeed, it should be recognized that the *New York Times* and *Curtis Publishing* cases represent a difficult accommodation of conflicting social values, the public interest in free speech on the one hand and the individual interest in reputation and privacy on the other. In striking this balance, the availability of a right of access for self-defense may well make tolerable a broader freedom of discussion. Such a right provides a remedy of value to the victim at a modest cost to the attacker. It provides a middle ground between injury without remedy and huge awards for unintended libels.[61]

CBS has submitted below an appendix listing certain "arguable" personal attacks which appeared in its programming. We urge the Court to study any such appendix with care. We believe that almost all of the quoted criticisms fall short of attacks on honesty, integrity or character or like personal qualities. We believe that network programs (other than on-the-spot news and news interviews) rarely contain such attacks, that there are probably less than ten a year, and that they are made only on organizations and individuals who have been the subject of considerable official scrutiny, e.g., the Ku Klux Klan, James

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[60] F.C.C. Annual Reports, 27th p. 62; 28th p. 78; 29th p. 84; 30th p. 82; 31st p. 127; 32nd p. 121; 33rd p. 170.

[61] See Note, *An Alternative to the General Damage Award for Defamation*, 20 Stanford Law Review 504 (1968).

Hoffa and Congressman Adam Clayton Powell. We believe that in almost every case where such an attack is made (as in news documentaries), an opportunity to respond is given within the program which contains the attack. We believe, in short, that the extravagant predictions of cost, inconvenience and inhibition which the broadcasters make are founded on nothing but ingenuity and imagination. We find it difficult to believe that anything could be less robust than the discussion presently taking place on network documentaries. The best evidence of this is the fact that the Senate Study of the Fairness Doctrine indicated that there wasn't a single personal attack complaint against a network out of 173 such complaints during a test period (See p. 12, *supra*).

The Commission has already indicated by both words and acts its willingness to consider changes in the rules as they appear to be in the public interest. The rules have been amended twice since they were adopted. In its opinion accompanying the order the Commission stated:

> "It may be that experience will indicate the need or desirability of other revisions, clarifications, or waivers of the rule in particular factual situations. If so, we shall act promptly to make whatever changes the public interest in the larger and more effective use of radio requires." (32 Fed. Reg. 11532, par. 4)

One thing is clear. Although the Commission has been greatly concerned with the problem of fair use of the airwaves for over two decades, it has moved very slowly in taking effective action to force compliance with the Doctrine, apparently hoping that with each restatement of its views, voluntary compliance would be forthcoming.

The broadcasting industry has no reason to fear that the Commission will disregard its interests in applying the new Rules.

CONCLUSION

This Court should find that the Commission's Personal Attack and Political Editorial Rules are reasonable and proper, should affirm the judgment of the Court of Appeals for the District of Columbia Circuit and should reverse the judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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February, 1969.

Columbia Broadcasting System, What the New Radio Rules Mean (New York: Columbia Broadcasting System, 1941), pp. 3-4.

What the New Radio Rules Mean

SOMETIMES you have to take a thing away from people to get them to realize what it means to lose it.

That is going to be true of radio broadcasting as we know it in America unless people understand what is happening and do something about it.

The Federal Communications Commission has adopted eight new "regulations." Most people will never see them or read them. They are wrapped up in a thick government report. Like a bitter pill, they are sugar-coated with nice words and high-sounding phrases about the public interest. Then, to make the deception complete, they are handed out with a press release that would make people think the Commission is protecting what it is actually wrecking. Like calling a blitzkrieg a rescue party.

In its report, and in subsequent utterances by its Chairman, the Commission bolsters its attack on the networks by the loose, unsubstantiated use of such words as "monopoly," "domination," and "control." Since the public is interested not in epithets, but in the truth about American broadcasting practices, we call particular attention to pages 23 to 32 of this analysis which deal with the realities of these aspects of network broadcasting.

Columbia Broadcasting System here states, and in subsequent pages demonstrates, that, instead of benefiting the public, instead of promoting sound competition, instead of improving radio broadcasting, what the Commission proposes to do will have these effects:

1. It will threaten the very existence of present network broadcasting service, bring confusion to radio listeners, to radio stations, and to the users of radio, and deprive business of an orderly and stable method of presenting sponsored programs to the people.

2. It will threaten the continuance to radio listeners of their favorite sustaining programs sent out by the networks, such as the New York Philharmonic-Symphony broadcasts, educational and religious programs, world news service. We do not see how, under these "regulations," Columbia or anyone else can afford to, or has any real inducement to, produce and broadcast programs of this kind and to maintain and improve the character of its public service.

3. It will establish radio monopolies in many sections of the country which are now served by competing stations and competing networks and deprive hundreds of radio stations of an important source of revenue, besides seriously affecting their opportunity to build up their local audiences through network programs.

4. In weakening the ability of the radio industry to give the kind of broadcasting service that people have come to demand, it may, in the end, encourage the government to take over broadcasting altogether. Meantime it opens the door to the complete domination of radio by whatever government happens to be in power.

5. It will cripple, if it does not paralyze, broadcasting as a national service at a time when radio should be encouraged to continue and enlarge its contribution to national unity and morale.